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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

EMANUEL RIGGI,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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vs.

UNITED STATES OF AMERICA,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable the Chief Justice and the Associate Justices of the United States:

Petitioner, Emanuel Riggi, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above-entitled case on May 27th, 1958, which affirmed his conviction for violation of Title 18 U. S. C. Section 1951.

Opinions Below.

The District Court did not file an opinion. The opinion of the Court of Appeals, printed infra, (Appendix to this Petition, page 12), has not yet been officially reported.

Jurisdiction.

The judgment of the Court of Appeals was entered on May 27th, 1958. The jurisdiction of this Court is invoked under Title 28 U. S. C. Section 1254 (1).

Question Presented.

1. Whether a defendant in a criminal case is denied a fair trial when the trial court fails to instruct the jury concerning the nature of the defense.

Statute Involved.

The petitioner was indicted, convicted and sentenced under the Hobbs Act, Title 18 U. S. C. Section 1951. The question presented in this Petition does not involve the statute.

Statement.

Chemsteel Construction Company of Pittsburgh, Pennsylvania, contracted with American Cyanamid Corporation of Linden, New Jersey, to build there a brick acid concentration tank (21a, 84a, 121a).

Harry Smith, a Chemsteel superintendent, following his customary procedure went to the bricklayer's union hall to check in with the business agent of the bricklayer's union whose job it was to place bricklayers on jobs according to the contractor's request (20a, 21a, 88a, 196a, 236a, 247a). The bricklayer's business agent was a co-defendant, Albert Doyle, who did not appeal his conviction.

Doyle approved Smith's request to use on the job Chemsteel workers as well as local bricklayers (26a, 237a). According to Smith, Doyle told him: "He said he had a boat and some other heavy expenses, and he wasn't just a business agent in there for his health; he was in there for money * * * He said he'd like to have one bricklayer on his payroll that didn't work * * * to insure peaceful workmanship or peaceful relationship * * *" (27a, 28a). Smith told Doyle he thought it could be arranged (28a).

Doyle asked Smith if he checked in with Riggi, who was the business agent of the hodcarrier's (laborers) local union (28a). The bricklayers cannot work without the laborers on any construction job (238a, 273a). When there is a construction job requiring bricklaying, the procedure is that Doyle and the superintendent on the job appear at Riggi's office or contact him (274a, 279a). And Chemsteel's superintendent customarily saw the laborers' business agent to get straightened out with him before starting a job (29a, 30a). Chemsteel had jobs in the Elizabeth area every year beginning in 1952 (162a).

Smith testified that when he arrived at Riggi's office, Doyle beckoned to him from an upstairs window (30a). Smith went upstairs, Doyle told him to wait outside Riggi's office (30a). Doyle and Riggi went into Riggi's office, they closed the door and in about twenty minutes Doyle asked Smith to come into the office (31a). Doyle, Riggi and Smith conferred in Riggi's office (31a to 36a). Smith explained to Riggi that he needed local laborers and he wanted to bring in Chemsteel men (31a). Riggi said probably it could be arranged (32a). Doyle said Riggi wanted

the same set-up for an extra non-working bricklayer (32a). Smith said it could not be arranged through him because he had no authority to do it (32a). Doyle said the other bricklayer should be on Riggi's payroll to insure a smooth job (33a). Smith asked Riggi to phone Merrill Stewart, Smith's superior in Pittsburgh (33a, 34a). Riggi refused (34a). When Doyle said nonworking bricklayers were to be added to Chemsteel's payroll, Smith asked Riggi for the name and Social Security number of a laborer (36a). Riggi did not do it (36a). Riggi told Smith that if he wanted to be sure of labor relations on the job, Smith better call Stewart and have him come to Elizabeth because he did not want to talk to him if he was not the man who could settle it (37a).

After Doyle and Smith left Riggi's office, Doyle told Smith he would furnish the names and Social Security numbers of the brick laborers (38a). Doyle suggested to Smith that there would be a good acid brick foreman available in about four days (249a). Doyle was thinking about Murphy (39a, 249a), who was working on another job (198a), but who previously had worked as a foreman (205a, 249a).

Several days later Smith phoned Stewart and told him there was a demand to put two non-working men on the payroll, one man for each business agent (41a, 123a, 129a). Smith told Stewart the purpose was to insure labor relationships and to allow Chemsteel to use its own men (41a). All that Stewart said was that it was too big a job for Smith to handle so he would send another superintendent to replace him (43a).

Smith began working on the job. In several days Stewart and the substitute superintendent, Brown arrived on the job (38a, 43a, 44a, 87a, 133a, 159a).

Chemsteel had made it a habit in all its years in the construction business to go to the local union authorities to get their local rules to follow (154a). Stewart, Brown and Doyle met (135a, 173a, 242a). Stewart remarked that Chemsteel had been doing financially successful work in the area since 1950 and he wanted to meet the business agents from whom he got the bricklayers (242a). Stewart testified that Doyle said " 'You understand that you are to put on two men * * * I'm to get half of it and the laborer business agent is to get the other half' " (137a, 138a). Doyle named Riggi as the laborer business agent (138a). When Stewart raised problems about Social Security and an auditor, Doyle told him to make Murphy foreman, give him the money and they would give Stewart the records (138a). Doyle said that if Chemsteel would go along on those bases, there would not be any trouble on the job (139a). Stewart agreed to go along (149a). RIGGI WAS NOT PRESENT AT THESE CONVERSATIONS.

Later that day Stewart, Brown, Doyle and Riggi ate lunch together. As to the conversations at the luncheon table, Brown recalled nothing (175a), Doyle testified about the congeniality and that nothing special was said (168a, 244a). Only Stewart testified that anything was said about the Cyanamid job: "He [Riggi] looked over to me during the conversation and said, 'Are you all straight with Doyle?' I said, 'Yes.' He said, 'Well, that's fine. You can bring in anyone you care to.' " (143a). The trial court's opinion of Stewart's testimony on this point was that the inference from Riggi's statement is "equally innocent" (Tr. 338).

Murphy started to work on the job (198a). About one week later, Doyle gave him the names Sal Vencola and

Stanley Pudvesky to give to Stewart (199a). Doyle said the two men would be on the payroll (199a). Murphy gave the two names to Smith (200a). Vencola and Pudvesky never were members of the bricklayer's local union in 1956 (164a), Murphy did not know them (199a), Smith never met them (50a), Brown did not know them (179a), and they never worked or were seen on the job (50a).

Every Friday, Brown gave Murphy two pay envelopes and Murphy signed the names Vencola and Pudvesky (51a, 52a, 183a, 200a). Doyle sometimes signed the two names (201a, *et seq.*).

On Friday nights Murphy gave the two pay envelopes to Doyle (204a). Once Murphy accumulated six envelopes while Doyle was in Seattle (205a, 212a). Doyle told him he kept one envelope and the other was going to Riggi (205a).

Riggi denied attempting to extort money from Chemsteel, or conspiring with Doyle and Murphy, or receiving money (278a).

Reasons for Granting Writ.

While the government's case against Riggi was based upon his presence during discussions between Doyle and Smith and his knowledge of Doyle's scheme to extort, the theory of Riggi's defense was that if he were present during some of the discussions, he neither participated in Doyle's scheme nor consented to it. This theory was supported by uncontradicted testimony that bricklayers cannot work without the laborers on any construction job and, "on a lot" of occasions, disputes on a job required Riggi and Doyle to go to the job site together and settle them

(280a). On or about September 4, 1956 after Doyle demanded that Smith approve the scheme, they went to Riggi's office. This was the Smith-Riggi meeting upon which the government based its case. There was a sharp and hotly contested issue, first about whether the three men met and conferred together, and second about what was said. Both Riggi and Doyle testified they met to settle a jurisdictional dispute that had arisen on a job (238a, 239a, 276a, 279a, 280a). The government's evidence tended to show they met and conferred to extort money from Chemsteel (30a, *et seq.*).

Thus, while there was uncontradicted testimony that Riggi and Doyle were together "a lot" because of the nature of their jobs, there was conflicting testimony about whether their jobs or conspiracy brought them together on or about September 4, 1956. Both men admitted they met at that time. If Riggi were associating with a guilty man, he was entitled to have the jury instructed that that fact was not evidence he was guilty of a Hobbs Act crime. *United States* v. *O'Brien*, 174 F. 2d 341, 345 (C. A. 7 1949). The instructions he requested would have informed the jury that such a meeting, as well as others, was not proof of guilt without other evidence. Since the court refused the requests, the jury was allowed to infer from a meeting that admittedly occurred, that Doyle and Riggi met to conspire.

It was in this context that Riggi requested the trial court to instruct the jury as follows:

> "18. If you find from all of the evidence that Emanuel Riggi had knowledge that Doyle and Murphy had entered into an understanding or agreement with the executives and employees of Chemsteel

Corporation, this knowledge would not be sufficient to make him a conspirator. Knowledge of payments in reference to the fictitious bricklayers in and of itself is not sufficient to make him an aider and abettor or co-conspirator of Doyle and Murphy. Before you may find Emanuel Riggi guilty it is essential that you be satisfied beyond a reasonable doubt that Emanuel Riggi, in addition to the knowledge of the alleged arrangement, acted upon it and promoted the venture himself, make it his own and have a stake in its outcome. If you do not find beyond a reasonable doubt these factors, then Emanuel Riggi is not a conspirator, nor is he an aider and abettor in the conduct of Doyle and Murphy, and it is your duty, therefore, to find Emanuel Riggi not guilty. (U. S. *vs.* Falcone, 109 Fed. (2d) 579, Affirmed 311 U. S. 143).

"19. There is evidence before you that a bricklayer requires, as part of his work, the aid and assistance of a common laborer. There is evidence before you that Doyle is the business agent of a Bricklayer's Union. There is likewise evidence before you that Emanuel Riggi is the business agent of what is commonly referred to as the Laborers' Union. The mere fact that Doyle and Riggi associated together, without more, is not evidence that their association was for a guilty purpose. You have no right to suspect that the mere conversation had between Doyle and Riggi were in and of themselves concerned for any illegal purpose. Their association and conversation, without more, is not proof of guilt. Presumptions of guilt are not lightly to be indulged from mere meetings (U. S. *v.* Di Re, 332 U. S. 581, 593)" (323a, 324a).

The court refused the requests (315a) and the instructions regarding the general nature of a conspiracy did not substantially include the requests (302a, 311a).

The Court of Appeals approval of the trial court's failure to instruct the jury about Riggi's defense conflicts with its own decision in *United States* vs. *Harrison*, 124 F. 2d 930 (C. A. 3, 1941), cert. denied 314 U. S. 661, 62 Sup. Ct. 124 (1941). There the Court of Appeals held that to make a person a co-conspirator there must be evidence of "an intention to become a party to an illegal enterprise * * * predicated on some affirmative action" (at page 933).

The Court of Appeals' decision below also conflicts with at least two other Courts' of Appeals decisions. In *Turcott* vs. *United States*, 21 F. 2d 829 (C. A. 7, 1927), the court held "The law is well settled that active participation must be established; mere knowledge of the illegal acts of others is not sufficient". And in *Boyett* vs. *United States*, 48 F. 2d 482 (C. A. 5, 1931), the court held "* * * [m]ere knowledge that an offense is being committed is not equivalent to participation with criminal intent. Consent is a necessary element and must also be shown. While this may be inferred from all the circumstances disclosed, it is always a question for the jury * * *".

The refusal of the court to instruct the jury as Riggi requested or to do it substantially in other portions of the instructions denied Riggi a fair trial. While it is not certain the jury found him guilty only from the evidence of his association with Doyle, or from his presence during Doyle's discussions with Smith, or from his knowledge of Doyle's scheme, nevertheless if the court had instructed the jury as Riggi properly requested, it would have eliminated the risk of even the likelihood that his conviction would be based solely on that insufficient evidence.

Since there was testimony that Riggi was present at the Doyle-Smith and other conferences, the government was entitled to an instruction that evidence of presence, knowledge and association were facts for the jury to consider. But Riggi was entitled to instructions that those facts alone were insufficient evidence of guilt. Unless the jury had been properly instructed, it might have inferred from those facts that Riggi participated in the crime. The law does not permit such an inference; courts do not permit convictions based on guilt by association. *United States* v. *Falcone*, 109 F. 2d 579 (C. A. 2 1940), aff'd 311 U. S. 205, 61 Sup. Ct. 204 (1940), was a case in which Judge Learned Hand emphatically stated that association is not of itself sufficient evidence to convict. He warned of the need for precautions or association alone would result in convictions of innocent persons:

> "* * * [I]n prosecutions for conspiracy or abetting his [the defendant's] attitude towards the forbidden undertaking must be more positive. It is not enough that he does not forego a normally lawful activity, of the fruits of which he knows that others will make an unlawful use; he must in some sense promote their venture himself, make it his own, have a stake in its outcome. The distinction is especially important today when *so many prosecutors seek to sweep within the drag-net of conspiracy all those who have been associated in any degree whatever with the main offenders.* That there are opportunities of great oppression in such a doctrine is very plain, and it is only by circumscribing the scope of such all comprehensive indictments that they can be avoided." (At page 581.) (Emphasis supplied.)

Here, the indictment against Riggi should have been circumscribed by the court's instructing the jury as he re-

quested. This would have prevented the improper conviction such as the one occurring in *United States* v. *O'Brien*, 174 F. 2d 341 (C. A. 7 1949). In reversing the conviction of O'Brien who had been convicted along with Keating, the court held:

> "* * * There may be a suspicion that O'Brien and Keating had the same interest in this truck for the occasion and in the stolen butter that was found in the truck, but it is only a suspicion and not enough to send O'Brien to the penitentiary. United States *v.* Waimen, 7th Cir., 170 F. 2d 603. If Keating is guilty, the most that can be said of O'Brien is that he was associating with a guilty man. * * *"

Conclusion.

The petitioner was denied a fair trial as a result of the decision below approving the failure of the trial court to instruct the jury about the nature of his defense. Sufficient evidence was adduced by the defendant to compel the substance of the instructions requested by petitioner. The learned Third Circuit's decision at bar conflicts with its own prior decision and those of the Courts of Appeals for the Fifth and Seventh Circuits.

The requested instructions embodied the facts and evidence as well as the principles of law directly applicable, and the denial of these instructions to petitioner was highly prejudicial to his right of a fair trial.

Petitioner, therefore, prays that a writ of certiorari be granted.

Respectfully submitted,

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APPENDIX TO PETITION.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12,508

UNITED STATES OF AMERICA

v.

EMANUEL RIGGI

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Argued May 12, 1958
Before KALODNER, STALEY and HASTIE, *Circuit Judges*

Opinion of the Court.

(Filed May 27, 1958.)

PER CURIAM.

Our review of the record discloses that there was ample evidence to sustain the jury's verdict.

We find no error in the trial court's charge to the jury. Further, we are of the opinion that the trial court did not err in refusing to instruct the jury in the language set forth by the defendant in his requests Nos. 18 and 19. The substance of the requested instructions was adequately embraced in the trial court's charge to the jury.

The judgment of the District Court will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
For the Third Circuit.